

Alternative Dispute Resolution in the University Community: The Power and Presence of the American Association of University Professors (AAUP)

I. INTRODUCTION

In his well-known *Phaedo*, Plato states that “[t]he soul takes nothing with her to the other world but her education and culture.”¹ In reality, education and culture are so inextricably tied together that without the preservation and advancement of the ideals of education, our culture can do nothing but regress. The American Association of University Professors (AAUP) recognizes this fact and, consequently, it strives to achieve its primary goal of the enhancement of all scholarly endeavors.² To further this goal, the AAUP helps to resolve disputes between educators and administrators with the ultimate aim of furthering the overall knowledge and well-being of society. While it is clear that disputes are inevitable within the university community, it is equally obvious that when time is spent arguing, time is lost teaching. This is what the AAUP seeks to avoid. The purpose of this Note is to examine the role which the American Association of University Professors plays as a means of alternative dispute resolution within the university community, to measure its effectiveness in the past, and to examine this group’s outlook for the future.

II. OVERVIEW OF THE AAUP

The American Association of University Professors was founded in 1915 by a group of eighteen professors, headed by Arthur Lovejoy and Dr. John Dewey.³ The first policy formulated by the AAUP dealt mainly with the protection of academic freedom; in fact, it has been said that the AAUP came into being because of the need for such a policy.⁴ As set forth in its constitution, the purpose of the AAUP is “to facilitate a more effective cooperation among teachers and researcher scholars . . . [and] to increase the usefulness and advance the standards, ideals, and welfare of the profession.”⁵ While the AAUP’s initial concern was almost exclusively with cases involving tenure, today this organization has vastly broadened its outlook.

1. Plato, *Phaedo*, in *THE TRIAL AND DEATH OF SOCRATES* 111 (L. Cooper ed. 1967).

2. AAUP, *ACADEMIC FREEDOM AND TENURE* 3 (L. Joughin ed. 1969).

3. *Id.* at 156.

4. Preface to AAUP, *ACADEMIC FREEDOM AND TENURE* at ix (L. Joughin ed. 1967).

5. AAUP, *supra* note 2.

Despite the presence of other organizations formed to enhance education in our country, the AAUP is the only national organization exclusively representing the interests of all college and university faculty members.⁶ In addition to a constant concern with tenure disputes, the AAUP establishes and maintains standards for academic due process and faculty participation in academic decision-making, participates in court cases involving academic freedom issues, represents faculty interests in state and federal legislatures, provides comprehensive data on the economic status of the profession, and offers professional liability insurance and other membership benefits and services.⁷ Active AAUP membership is open to teaching faculty, research scholars, professional librarians, and counselors with faculty status.⁸

The ultimate goal of the American Association of University Professors is "to maintain and advance the standards and ideals of the profession."⁹ In order to facilitate more effective cooperation among the members of the profession, "in the discharge of their special responsibilities as custodians of the interests of higher education and research in America," the AAUP actively encourages negotiation and mediation, as opposed to court action, when disputes arise.¹⁰ While no single "key" to an effective grievance procedure may exist, it is certain that expeditious resolution of grievances is desirable and that continued emphasis should be given to informal rather than formal settlements. Before taking a detailed look at specifically how the AAUP functions and why this group plays such a vital role in dispute resolution in the university community, it is essential to consider why the need for dispute resolution between college professors and the administration is of such importance.

III. PROFESSORS AND THE ADMINISTRATION

In *Keyishian v. Board of Regents*,¹¹ the Supreme Court of the United States stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.¹²

6. AAUP, NEW MEMBERS PAMPHLET AND APPLICATION (1986).

7. *Id.*

8. The AAUP began by offering membership on a very limited basis. The original constitution provided that only an individual who was "of recognized scholarship or scientific productivity who holds and for ten years has held a position of teaching or research" was eligible for membership. Today AAUP membership is open to virtually anyone who wishes to join. See AAUP CONST. art. II § 1 in Policy Documents and Reports 95 (1977).

9. AAUP, *supra* note 6.

10. AAUP, *supra* note 2, at 13.

11. 385 U.S. 589 (1967).

12. *Id.* at 603.

While neither the Constitution nor its Amendments explicitly mention education, it is clear that in the history of this nation the government, the general populace, and the scholars of our society have in one form or another expressed vast interest in education. In the famous case of *Brown v. Board of Education*,¹³ the Supreme Court emphasized this belief and stated that "education is perhaps the most important function of state and local government."¹⁴

Although little argument exists about the importance of education, some dispute remains as to the roles which various parties should play in the educational process. While both faculty members and administrators agree that a well-educated citizenry is the ultimate goal which is sought to be achieved, the means of accomplishing this are often in controversy. In *Sweezy v. New Hampshire*,¹⁵ the Court held:

[T]he essentiality of freedom in the community of American Universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation.¹⁶

Although it is undeniable that "scholarship cannot flourish in an atmosphere of suspicion and distrust,"¹⁷ such an atmosphere exists in a number of university communities today.

A. Areas of Dispute Between College Faculties and Administrators

When a broad overview is taken of the academic field, at least seven areas appear which are often the focus of "power struggles" in organized schools.¹⁸ These areas, which are by no means all-inclusive, include: (1) long range planning, (2) retrenchment, (3) promotion, (4) appointment, (5) non-renewal, (6) tenure, and (7) management rights.¹⁹ Whenever administrators in colleges and universities examine their decision-making task, almost all maintain that in the interest of effective and efficient management some decisions must not be shared with the faculty or its bargaining representatives.²⁰ Alternatively, faculty members, not trustees or administrators, are the ones who usually claim that it is their job to seek to uphold academic standards. They are, by necessity, involved with the concerns of the university. While some scholars have suggested

13. 347 U.S. 483 (1953).

14. *Id.* at 493.

15. 354 U.S. 234 (1957).

16. *Id.* at 250.

17. *Id.*

18. See generally M. CHANDLER & D. JULIUS, *FACULTY V. ADMINISTRATION: RIGHTS ISSUES IN ACADEMIC COLLECTIVE BARGAINING* 5 (1979).

19. *Id.* at 4.

20. *Id.*

that a close reading of the early literature on university administration reveals that both faculty and administration were held responsible for the management of the college,²¹ today's faculty tends to play a less significant role in management. This is not because faculty does not want a voice in important matters. Rather, it is because administrators would prefer to run affairs themselves.

Suggested theories as to the cause of an increasing number of disputes between college faculty and administration include post-Industrial Revolution developments,²² the power of unions,²³ and more "business-oriented" college administrators.²⁴ But one thing which is agreed upon is that "complex rights issues are endemic to the faculty-administration relationship."²⁵ In other words, although it would be desirable to have a utopic university community, recent history shows that this is not likely to happen. Realizing that disputes were likely to be the rule rather than the exception, several groups have specifically organized themselves to assist in faculty-administration confrontations.

B. *The Emergence of Faculty-Administrator "Go-Betweens"*

Three national educational associations of significance exist in the United States: The American Federation of Teachers (AFT),²⁶ the National Education Association (NEA),²⁷ and the American Association of University Professors (AAUP).²⁸ All three of these groups claim the ultimate goal of improving society through a continuously developing educational system. The functions and approaches associated with each, however, are quite different. While it is not the purpose of this Note to compare these groups, a broad overview of such organizations will be helpful.

The AFT, founded in 1916, initially emerged as a radical segment of the earlier established National Education Association.²⁹ The AFT has been characterized as a militant organization and as a core group in the national labor movement.³⁰ Initially, this group was formed primarily to unionize educational employees. During the 1960s, the AFT had great success in organizing junior college faculties.³¹ Despite its

21. See generally C. ELIOT, UNIVERSITY ADMINISTRATION 194 (1908).

22. M. CHANDLER & D. JULIUS, *supra* note 18, at 10.

23. *Id.* at 11.

24. *Id.*

25. *Id.* at 78.

26. See generally W. EATON, THE AMERICAN FEDERATION OF TEACHERS 12 (1975).

27. See generally R. CHANIN, PROTECTING TEACHERS' RIGHTS (1970).

28. AAUP, *supra* note 2.

29. W. EATON, *supra* note 26, at 18.

30. *Id.* at 19.

31. *Id.* at 198.

success in this area, a constant complaint of the rival NEA was that the AFT was overly concerned with "economic" problems, and not concerned enough with the "professional" concerns.³²

While the AFT is best characterized by such terms as "brash" and "bold," until the 1960s the National Education Association opposed the unionization of teachers. While this attitude has since changed, the NEA still primarily takes the view that teachers are professionals and the primary goal of professionals is to provide services to their "clients," namely the individuals in the community.³³ The NEA is the largest and oldest of the three national faculty associations. It is viewed as an organization with numerous resources and great political clout. While this is true, it is the American Association of University Professors which takes on the most active role in problem-solving and dispute resolution between college faculty and the related administration.

IV. GUIDING PRINCIPLES OF THE AAUP

In 1915, at the time of the founding of the AAUP, a committee from the AAUP on academic freedom and tenure formulated a statement entitled a "Declaration of Principles."³⁴ This statement set forth the concern of the AAUP for academic freedom and tenure, proper procedures, and professional responsibility. The Declaration was endorsed by the AAUP at its Second Annual Meeting, held January 1, 1916.³⁵

While this original "Declaration of Principles" has continued to serve as the cornerstone of the AAUP, in 1940 a "Statement of Principles on Academic Freedom and Tenure" was formulated.³⁶ Widespread acceptance of the 1940 statement by institutions led to judicial acceptance of the Statement as the common law of the workplace. Today, the 1940 Statement has become the normative standard governing the fundamental principles of academic freedom.³⁷

The Statement makes clear that "institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole."³⁸ In addition, it is pointed out that "the common good depends upon the free search for truth and its free exposition."³⁹ Although "the free search for truth"

32. *Id.* at 18.

33. R. CHANIN, *supra* note 27, at 10.

34. AAUP, *supra* note 2, at 155.

35. *Id.*

36. *Id.* at 33.

37. THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION (NSSE), THE COURTS AND EDUCATION 314 (C. Hooker ed. 1978).

38. AAUP, *supra* note 2, at 34.

39. *Id.*

is of great importance, it is the "common good" which is the ultimate aim.

With this goal in mind, an examination of how the AAUP functions in order to achieve this aim is necessary.

The AAUP's actual operations involve college and universities—extremely complicated and ever-changing social organisms—as well as professors, administrators, and others. Before the AAUP will become involved, a faculty-oriented "grievance" must arise. A faculty member who believes that academic freedom or due process has been denied or who has some questions regarding a tenure conflict must approach the AAUP before any type of action will be initiated on behalf of the faculty member. While the AAUP is willing to provide assistance when asked, it will not seek out conflicts on its own.

A. Sample Procedures and Involvement of the AAUP⁴⁰

When a faculty member comes to the conclusion that an injustice has occurred, and substantial proof has been compiled to support this conclusion, the local chapter of the Association (if one exists) is the place to start for guidance. The Ohio State University has an active local chapter of the American Association of University Professors.⁴¹ As this Note progresses, the Ohio State Chapter will be used to illustrate typical involvement by a single institution.⁴²

Although no two "cases" in which the AAUP is involved are identical, an example of a so-called "typical" case will make it easier to see exactly how the AAUP functions. As with any court proceeding, a complaint is prepared by the aggrieved faculty member. It is worth noting that it is not necessary that the complainant be a member of the Association.⁴³ The complaint is then sent to the General Secretary of the AAUP who receives the complaint on behalf of Committee A, the most important of all of the AAUP's committees because of its designation as the national standing committee on tenure and academic freedom. After the General Secretary and Committee A examine a

40. A detailed "Model Case Procedure" is set out in AAUP, *ACADEMIC FREEDOM AND TENURE* 11-29 (L. Joughin ed. 1969).

41. William Protheroe, Professor of Astronomy, is, and has been, the Chairman of Committee A, the standing committee on tenure and academic freedom, at The Ohio State University. Stanley K. Laughlin, Professor of Law at The Ohio State University College of Law, was a long time member of Committee A, although he is no longer. Professor Laughlin provided a great deal of information dealing with the way in which the AAUP functions at a single institution.

42. Although an entire Note could be devoted to the way in which a local chapter of the AAUP operates at a particular institution, the information included in this Note is intended to give the reader some general ideas about how a local chapter operates. The information neither is, nor is intended to be, all-inclusive.

43. AAUP CONST. art II § 1 in Policy Documents and Reports 95 (1977).

complaint and determine that it is within their "jurisdiction,"⁴⁴ they will acknowledge receipt of the complaint, acquire any further information, and discuss the situation with the local chapter of the Association.

Once the AAUP deems a matter to be worth further pursuit, two possible alternatives exist. Either the matter will be settled through mediation and negotiation, or it will take on "case status." Ideally, the AAUP would like to settle all disputes through mediative efforts.⁴⁵ However, when settlement is not possible a letter is sent from the General Secretary of the AAUP to the president of the institution in question, informing the general administrator of the complaint and asking for his input. From the moment this standardized, "formal" letter is sent, the dispute is considered to have "case status."

When a dispute cannot be settled through mediation and reaches the level of "case status," it takes on many of the characteristics of actual court-based litigation. "Pre-trial Discovery," (through the use of investigating committees), conferences, and ultimately a decision as to whether or not to "censure" the institution in question all parallel an actual court proceeding. Association case reports may be found in *Academe*,⁴⁶ the AAUP's magazine, used for informing the academic community of departures from generally accepted practice.

While this is the procedure followed in some of the cases involving the AAUP, it is neither the goal of the Association nor the concern of this Note to deal with "case status" situations. Since the way in which the AAUP functions as a mediator between faculty and administrators is of primary concern, this will remain the primary focus.

B. *Why Does the AAUP Attempt to Mediate Disputes?*

"Mediation" is defined as "settlement of dispute by action of [an] intermediary."⁴⁷ Whenever mediation is put into use, it is the "informality" of the resolution process that is emphasized, as opposed to the formality of a court hearing. Additionally, the voluntary aspect of mediation must be stressed as its most beneficial element.

If the General Secretary of the AAUP feels that there is any possibility that mediation will bring about an adjustment, he will initiate mediative

44. Note, *The Role of Academic Freedom in Defining the Faculty Employment Contract*, 31 CASE W. RES. 608 (1981).

45. AAUP, *supra* note 2, at 13.

46. *Academe*: "Bulletin of the American Association of University Professors" is published six times a year. In each edition there is a section entitled "Censured Administrations" which lists the names of institutions which the AAUP feels "are not observing the general recognized principles of academic freedom and tenure endorsed by the Association." The list is published for the purpose of informing Association members, the professors at large, and the public that unsatisfactory conditions of academic freedom and tenure have been found to prevail at these institutions.

47. BLACK'S LAW DICTIONARY 885 (5th ed. 1979).

efforts. The General Secretary often works with the parties concerned through members of the faculty at the institution, chapter members and officers, Council members, and officers of the Association. In almost all instances, mediation of this type precludes publicity.

During the mediative efforts the local chapter, such as the one present at Ohio State University, performs several important functions. William Protheroe, Professor of Astronomy and Chairman of "Committee A" at Ohio State, oversees at least three major functions of the local chapter.⁴⁸ First, being a subdivision of the AAUP, the local chapter will constantly provide assistance to the General Secretary of the AAUP by informing him of any significant developments or possibilities for resolution that may have occurred. This role as "reporter" includes notifying the General Secretary when mediation might be possible and in addition, how it can further be enhanced once it has started. Basically, maintaining an open line of communication between the AAUP's national headquarters in Washington, D.C. and the institution in question is of primary significance for the AAUP. Second, the local chapter can be of great assistance in the orderly conduct of any investigative work which may need to be done. This includes readily accessible professors, papers and documents, and reports of the procedures found at the university. And finally, if mediation should fail to satisfy the grievant, the local chapter can assist in initiating a formal hearing or procedure, a step which the AAUP would like to avoid if at all possible.

A grievance procedure is not likely to be very effective when faculty-administration relationships are strained. Therefore, the AAUP continually tries to emphasize the informality of its mediation efforts. In fact, an informal environment to voluntarily settle disputes is one aspect which all groups in favor of mediation endorse.⁴⁹ However, the most significant factor about AAUP mediation is the faculty perspective which the group provides to the dispute. In collective bargaining, mediation customarily refers to the use of "outside neutrals" who have had no previous connection with either the employer or the employees.⁵⁰ In AAUP faculty grievance procedures, the mediator(s) is likely to be neither an outsider nor a true neutral, but a fellow faculty member (i.e. Grievance Officer) or a committee with a combination of faculty and administrators.⁵¹ These types of mediators, unlike a trial judge who may know very little about the academic community and surrounding conditions, can provide much

48. Interview with Stanley K. Laughlin, Professor of Law at The Ohio State University College of Law, and long-time member of Committee A at O.S.U., in Columbus (Oct. 18, 1986) [hereinafter Laughlin Interview].

49. See generally R. COULSON, *HOW TO STAY OUT OF COURT* 9 (1968).

50. Estey, *Faculty Grievance Procedures Outside Collective Bargaining*, 72 A.A.U.P. BULL. 6 (1986).

51. AAUP, *supra* note 2, at 14.

more insight toward reaching a mutually satisfactory agreement. The concept of academic freedom is

tightly bound up with special needs, problems, and expectations of the teaching profession. A judge who does not understand these needs, problems, and expectations is not likely to be very helpful in dealing with a case in which academic freedom is the central issue . . . [H]e may do more harm than good, simply because he does not understand the nature of the academic life.⁵²

While this is one of the primary advantages for attempting to mediate university community disputes through the AAUP, numerous other advantages and disadvantages for using this type of dispute resolution are also worthy of mention.

V. ADVANTAGES AND DISADVANTAGES OF USING THE AAUP FOR DISPUTE RESOLUTION

A. *Effectiveness of Out-Of-Court Mediation*

In a recent survey of faculty grievance procedures outside collective bargaining, Martin Estey concluded that "[t]he importance of mediation, or informal procedures, as compared to formal hearings, is underscored by the evidence that at most institutions the majority of grievances are settled informally."⁵³ One measure of success for grievance procedures, Estey points out, is whether the administration generally accepts the recommendations of the mediator, usually a grievance committee.⁵⁴ At Michigan State University, for instance, where Estey is a faculty member, grievants fared much better in informal resolutions than in formal ones, "winning" eighteen of twenty-four informal settlements, as against twenty of forty-eight formal ones in 1985.⁵⁵

While it may be true that at most institutions the majority of grievances are settled informally, at many institutions the resistance of either faculty members or administrators to negotiate or even consider compromise causes problems. It has been pointed out that statements by administrators, such as "if teachers want to run things, they should get jobs in the administration," are not uncommon.⁵⁶ Meanwhile, Professor Stanley K. Laughlin from The Ohio State University College of Law, a long-time member of "Committee A" at Ohio State, states

52. Fellman, *Academic Freedom — The Price is Eternal Vigilance by Professors (I)*, in *ON ACADEMIC FREEDOM* 19 (V. Earle ed. 1971).

53. Estey, *supra* note 50, at 12.

54. *Id.*

55. *Id.* at 15.

56. See generally W. KEAST, *FACULTY TENURE* 209 (1973).

simply that informal mediation at Ohio State has not always achieved great success due to a variety of reasons.⁵⁷ He points out that of the factors contributing to this result, the most important is that sometimes people who come to the AAUP claiming that they have been unjustly denied tenure or treated inappropriately have actually been dealt with quite fairly.⁵⁸ Laughlin points out that while people who seek the help of the AAUP usually have a personal belief that they have been mistreated, a broader examination often proves this was not the case.⁵⁹

Nevertheless, Laughlin is quick to emphasize that occasionally a faculty member will come forth who truly has a legitimate grievance and who has not been given fair treatment.⁶⁰ This is not the type of case where a faculty member seeks the assistance of the AAUP for the sole purpose of airing an insignificant complaint.⁶¹ Instead, Laughlin states that this is the type of case where a professor's educational freedom has clearly been infringed upon.⁶² Many professors and faculty members enter the world of academia to be free to experiment with new ideas and new methodology of teaching, and Laughlin makes the point clear that if these initiatives are continually stymied, then those who may have previously entered the academic profession will be lost to other fields.⁶³

A major point made by Professor Laughlin is that often during the course of mediation, administrators may admit that a particular rule, procedure, or decision-making process is unfair and should be changed. Although they are willing to change the rules, they are not willing to reinstate the dismissed faculty member.⁶⁴ For the individual who has been wronged, this serves very little purpose. In many ways, the bottom line in the success or failure of this type of mediative process will depend upon the personalities of the parties involved. This, of course, can only be examined on a case-by-case basis.

B. *Use of the AAUP vs. Use of Ombudsmen*

At many colleges and universities an "Office of University Ombudsman" exists. At Ohio State University, for example, such an office was created on September 10, 1970, by the Board of Trustees and has been in existence ever since.⁶⁵ In general terms, an ombudsman is an

57. Laughlin Interview, *supra* note 48.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. The Office of the Univ. Ombudsman, The Ohio State Univ., 1975 ANNUAL REPORT (1976).

official or semi-official office to which people may come with grievances connected with the university government. Basically, the ombudsman stands between, and represents, the citizens before the government.⁶⁶

Whereas the AAUP tries to resolve disputes which arise predominantly between faculty and administration, ombudsmen deal with a far greater range of problems. While ombudsmen do handle problems associated with administrative policies and faculty concerns, they are also involved with such items as traffic and parking, residence and dining halls, athletics, recreation, and athletic event tickets.⁶⁷ The effectiveness of the university ombudsman is dependent upon the utilization of the services of that office by persons with problems, complaints, or concerns involving the university, including faculty, students, alumni, and employees.

An individual faculty member having a dispute with the administration at the institution need not make use of the AAUP. In fact, nearly all universities have some form of grievance procedure, including the use of ombudsmen, which faculty members are encouraged and recommended to use. The advantage of bringing the AAUP into the dispute is the prompt attention and focused concern which that group will provide to the situation. While ombudsmen may be effective in particular situations, generally, the larger and more diversified an office becomes the less it is able to represent the particular interests of any one group. The AAUP, on the other hand, restricts its scope of concerns for this very reason.⁶⁸

C. The "Confidentiality/Lack of Publicity" Issues

In almost all instances, mediation in which the AAUP is involved precludes publicity.⁶⁹ In many cases, this is why both the faculty and the administration prefer trying to reach a voluntary settlement as opposed to a public hearing or trial. University officials have a desire to protect the reputation of the university, while at the same time, professors who may be interested in moving on to a different institution seek to avoid a "trouble-maker" label. Thus, it will be mutually beneficial if both parties can come to a satisfactory agreement without having to be placed before the public eye.

On the other hand, when mediation precludes publicity it also precludes alerting the profession to the possibility of repetitious issues. In essence, if the AAUP elects private mediation it must be reasonably

66. *Id.* at 3.

67. *Id.* at 35.

68. AAUP, *supra* note 2, at 8.

69. *Id.* at 14.

well-satisfied that the situation which led to the complaint will not or is not likely to arise again.⁷⁰

It is the hope of the Association that, in order to protect the entire mediative process from uninformed or critical reactions, all parties to an academic controversy will refrain from publicizing their differences. If for some reason the incident is publicized, all public statements surrounding the matter should be carefully scrutinized.⁷¹

D. Access to the AAUP

One of the primary advantages of using the AAUP to help resolve disputes is that it is not necessary that a complainant be a member of the AAUP. One of the most striking examples of this fact is the help and guidance provided to Jan Kemp, a professor at the University of Georgia, by AAUP.⁷² Kemp, who had failed to join the AAUP on the advice of the President of the University of Georgia, the man "who would later become her bitterest adversary," lost her job for speaking out against the preferential academic treatment given to athletes.⁷³ After being reinstated, Kemp told the members of the AAUP that it was solely the assistance provided by that organization which helped her to regain her status as a full-time faculty member.⁷⁴

In the same way that the AAUP does not discriminate between members and non-members, neither does it discriminate between unionized and non-unionized faculties. At the AAUP's annual meeting in 1972, the group voted to pursue collective bargaining as a major additional way of realizing the Association's goals.⁷⁵ While up until the 1960s very few faculties had unionized, this has changed drastically in recent years.⁷⁶ Nevertheless, the AAUP continues to provide support to persons in either situation.

As with similar organizations in other fields, the AAUP emphasizes that it is the willingness of the parties to mediate their dispute, and not the fact that they are a member of the Association or a non-unionized faculty member, that is important. "Academic integrity," and not "personal affiliation," is the fundamental concern of the AAUP.

70. Laughlin Interview, *supra* note 48.

71. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE (1985).

72. 72 A.A.U.P. BULL. 4 (1986). Professor Jan Kemp of the University of Georgia addressed the annual meeting of the AAUP in 1986, and a portion of her comments are presented in the July-August issue of *Academe*.

73. *Id.*

74. *Id.*

75. M. CHAMBERS, THE COLLEGES AND THE COURTS 181 (1973).

76. S. COLE, THE UNIONIZATION OF TEACHERS 162 (1969).

E. *Binding Effect of Decisions Made*

If mediation between faculty members and the administration is successful, and the parties voluntarily reach an agreement, nothing else need be done. Unfortunately, this is often the "ideal" way in which a problem is solved, as opposed to what happens in actual practice. It is not uncommon for parties who are diametrically opposed to refuse to give up any ground on their position. This can delay negotiations for weeks, months or even longer. If the grievant finds that the result of the mediation is not satisfactory, or if there is no hopeful prospect for mediation, the potential for some type of formal proceeding increases greatly. The General Secretary of the AAUP might initiate an investigation and form an ad hoc committee to look into the matter.⁷⁷

If such a "panel" finds a complaining professor entirely justified in the stated allegations, the principal weapon used by the AAUP will be professional sanctions.⁷⁸ Such sanctions, when printed in the official journal of the AAUP, *Academe*, are supposed to dissuade any prospective employee from seeking work at the institution so advertised in the "sanction section" of the journal.⁷⁹ While such a procedure has advantages, by assuming that people will not seek jobs at institutions "reprimanded" by the AAUP, the practical effectiveness of the procedure is questionable. To be effective, there must be a strong inclination by Association members and non-members alike to abide by the sanctions. If a weak link in the AAUP procedures exists, it is the lack of an enforcement mechanism to make the sanctions truly binding.

As earlier pointed out, it is always possible that the AAUP will support an individual in a legal proceeding. However, this is not the goal of the Association.⁸⁰ When a professor is forced to spend time in a court-room, time is correspondingly spent out of the classroom. Although the goal of "the promotion of the interests of higher education and research" is simply not facilitated by lengthy court proceedings, this is a possible result of non-compliance with mediated settlements.

In an article dealing with "academic governance," William Spinrad⁸¹ states:

The AAUP's historic strivings for the advancement of excellence, justice, and fairness have been informed by a version of the ideal university: a comfortable academy of scholarly and saintly philosopher kings (both faculty and administrators) dedicated to the enhancement of knowledge and the

77. AAUP, *supra* note 2, at 15.

78. *Id.* at 4, 143-47.

79. *See supra* note 45.

80. *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1110 (1968).

81. Spinrad, *Pathway to Shared Authority: Collective Bargaining and Academic Governance*, 70 A.A.U.P. BULL. 29 (1984).

training of a properly educated citizenry—disputes and difficulties adjusted by informal agreements among peaceable, reasonable gentlemen, bonded by common goals and the honor of one's word.⁸²

As Spinrad points out, one of the major problems with the AAUP's mediative dispute resolution techniques is that a great deal rests on the "honor of one's word." There is no assurance that the parties will be satisfied or follow through with any promises made at an informal settlement, and there is nothing forcing them, other than the "censure" of publication in *Academe*, to be bound by any decisions.

VI. OUTLOOK OF THE AAUP IN THE FUTURE

A. *The Growth of Grievance Procedures Within the University Community*

Grievance procedures for faculty members are now found at most major colleges and universities in the United States.⁸³ The dramatic growth of these procedures has occurred predominantly in the last twenty years.⁸⁴ Nevertheless, it is important to keep in mind that just as faculty and administration can decide what is a "grievance," they also decide what issues may *not* be dealt with through grievance procedures. While most university grievance procedures are likely to encompass issues that would be of concern to the AAUP, this still does not mean that the AAUP will necessarily receive notice about them.

Regardless of whether or not a particular institution's grievance procedure encompasses a dispute which a faculty member may have with the administration, the AAUP will not let a violation of academic freedom or academic due process go unnoticed.⁸⁵ The AAUP's 1940 "Statement on Principles on Academic Freedom and Tenure" makes it clear that action against a faculty member cannot rightly be taken on grounds that limit freedom as an individual, as a member of the academic community, or as a teacher and scholar.⁸⁶ Even though grievance procedures have expanded, the AAUP is always ready to deal with problems that might not be covered elsewhere.

As grievance procedures have begun to take on an increasingly important role in the university community, at least three major observations can be made. First, grievance procedures within a university are a flexible and viable process for resolving faculty-administration disputes.

82. *Id.*

83. Estey, *supra* note 50, at 6.

84. S. COLE, *supra* note 76, at 3.

85. AAUP, 1940 *Statement of Principles on Academic Freedom and Tenure*, in AAUP, POLICY DOCUMENTS AND REPORTS 2 (1977).

86. *Id.*

Second, it is important for educators to be aware of the requirements and policy norms in conducting grievance procedures so as to effectuate professional relations in education. Finally, development of professional grievance procedures is relevant to all educational institutions. Colleges and universities are just now starting to realize on their own what the AAUP has been stressing since 1915.

In the academic world, the rights issues of today most probably will continue as the rights issues of tomorrow. Despite the expansion of inter-university grievance procedures, the need for organizations such as the AAUP will undoubtedly continue to exist.

B. *The Need for Faculty to Participate in "Governing" the University*

It is undeniable that both faculty members and administrators seek the common objective of continually improving the educational system. It is equally undeniable that a "utopic" university community where no disputes exist between parties is not likely to materialize in the near future. Nevertheless, one step toward this ideal is for faculty members to assert themselves and participate in the governing of the university, and for administrators to allow them some control. Faculty members must voice their opinions, suggest areas of improvement, and actively seek to aid in the management of the college.

The governance of colleges and universities varies from the situation where almost no organized faculty participation exists to cases where the elected "faculty senate" or equivalent body by some other name is efficiently organized, respected, and influential.⁸⁷ Justice Benjamin Cardozo stated: "By practice and tradition, the members of the faculty are masters and not servants . . . they have the independence appropriate to a company of scholars."⁸⁸ While some debate as to how much "independence" is appropriate for faculty members and scholars is likely to remain, a significant aspect of Cardozo's statement leads to the conclusion that the "state of mind" of a faculty as to its importance can be essential in avoiding disputes. Governance in large and small colleges and universities must be a shared responsibility of faculty and administration. Participatory democracy should be both the goal and the trend of the university community.

C. *NLRB v. Yeshiva*⁸⁹

Not enough can be said about the AAUP's guidance and contributions to the advancement of the ultimate aims of the academic profession.

87. See generally AAUP, *1968 Recommended Institutional Regulations on Academic Freedom and Tenure*, in AAUP, *POLICY DOCUMENTS AND REPORTS* (1977).

88. *Hamburger v. Cornell Univ.*, 240 N.Y. 328, 336, 148 N.E. 539, 541 (1925).

89. 444 U.S. 672 (1980).

Nevertheless, despite these contributions, relations between universities and their faculties have become increasingly complicated since 1980, when the United States Supreme Court reached its judgment in *NLRB v. Yeshiva University*.⁹⁰ In that case, the Yeshiva University Faculty Association filed a representation petition with the National Labor Relations Board, seeking certification as bargaining agent for the full-time faculty members of certain schools of Yeshiva University, a private institution. The University opposed the petition on the ground that all of its faculty members were managerial or supervisory personnel and, hence, not employees within the meaning of the National Labor Relations Act. The Court held that an independent institution of higher learning did not have to bargain with a union of faculty members whose role in making decisions about faculty appointments, promotions, and tenure was significant enough to qualify them as managerial employees.⁹¹

In his dissenting opinion, Justice Brennan convincingly points out that, "[t]he Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decision making that is a vestige of the great medieval university."⁹² Brennan points out that education has become "big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization.⁹³ The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decision-making process.⁹⁴

As a consequence of this significant ruling, university administrators and faculties will continue to need guidance for dealing with problems which they are not able to easily resolve. This is where the AAUP has helped in the past, and where it will have to take an even greater role in the future. If Justice Brennan is correct in the assertion that the *Yeshiva* decision "threatens to eliminate much of the administration's incentive to resolve its disputes with the faculty through open discussion and mutual agreement,"⁹⁵ the AAUP may be forced to become more active and influential than it ever has before.

90. *Id.*

91. *Id.* at 690.

92. *Id.* at 702 (Brennan, J., dissenting).

93. *Id.* at 703 (Brennan, J., dissenting).

94. *Id.*

95. *Id.* at 705 (Brennan, J., dissenting).

D. *Potential Solutions*

With the *Yeshiva* decision now more than seven years in the past, the question remains as to what can be done to ease the faculty-administration tensions that occur at many universities. While it is uncertain whether or not any definitive solution exists, commentators have come up with a few suggestions.

One possible solution is to draft faculty employment contracts as completely and accurately as other similar legal documents.⁹⁶ Presently, most employment contracts are form contracts which are not always as complete as they might be.⁹⁷ The obstacle encountered in drafting more thorough contracts, however, is that ideas such as "academic freedom" and "tenure" are ambiguous principles whose parameters cannot always be easily incorporated into a contract. Although this certainly is a drawback, more complete contracts should still continue to be the goal.

Another possible solution, suggested by prominent legal scholars, is intra-institutional cooperation between the AAUP and organizations representing various administrative interests.⁹⁸ The American Association of Colleges (AAC) is the most noteworthy organization representing such administrative interests.⁹⁹ If some type of joint group could be formed combining the AAC and the AAUP, a great deal could potentially be done to help ease existing tensions. Although attempting to arrive at a combined AAC-AAUP organization might seem analogous to combining Democrats and Republicans into one party, the goal is admirable: to ultimately benefit the educational institutions of our society.

While these are just two potential solutions, they are ideas which should not easily be dismissed. Although both would require a great deal of effort, any help they might afford would make such an effort worthwhile. Since "education makes us what we are,"¹⁰⁰ any effort would be an improvement.

VII. CONCLUSION

Although use of the AAUP is not a mandatory form of dispute resolution between faculty and administration, it can be an effective form. The emphasis which this group places on informal rather than formal settlements, the idea of having an inner-university "democracy

96. Aiken, *Legal Liabilities in Higher Education: Their Scope and Management*, 3 J. C. & U.L. 121, 236 (1976).

97. *Id.*

98. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1192-96 (1980).

99. See generally H. TAYLOR, *THE WORLD AS TEACHER* (1969).

100. C. HELVETIUS, DISCOURSE XXX, Ch. 30 (L. Cooper ed. 1976).

at work," and the ultimate commitment to the advancement of educational ideals will continue to make this organization a viable option for dispute resolution in years to come. Institutions of higher education are conducted for the common good of all, not to further the interest of either the individual teacher or the institution as a whole. Therefore, the American Association of University Professors will stay active in the university community to make sure that this ideal is achieved.

Basic differences in objectives, traditions, and perceptions will always exist to a certain extent between faculty and administration. While such differences are not always destructive to the university community, the conflicts must be resolved without bringing either party to its knees. Although each group has its own interests and goals, the parties must recognize their mutual dependence upon one another. No simple answers, no certainties, and no pat formulas exist to maintain productive relations between faculty and administration. But there is one group that has shown that it is willing to do all it can to advance the educational goals of our society. That group is the American Association of University Professors.

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